PP

v.

HOSSEIN ROSHANGAH & ANOR

HIGH COURT MALAYA, SHAH ALAM
KN SEGARA J
[CRIMINAL TRIAL NO: 45-12-2001]
5 FEBRUARY 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39(B)(1)(a) and 39A(2) - Trafficking and possession - Appeal against order of acquittal - Whether prosecution failed to establish prima facie case - Exclusive occupation of apartment - Whether there was clear access to others - Prosecution's failure to investigate whether 'Rashid' a fictitious character - Whether prosecution established possession*

Both the accused were acquitted and discharged by this court without their defences being called as the prosecution had failed to prove a *prima facie* case for the first charge of trafficking raw opium and the second charge that both the accused had exclusive access to their apartment to have possession of raw opium under the Dangerous Drugs Act 1952 under s. 39B(1)(a) and s. 39A(2) respectively. The prosecution appealed against the order of acquittal by this court. The Court of Appeal allowed the appeal by the prosecution and directed both the accused to submit their defence in respect of the first charge. The 1st accused was also directed to submit his defence on the second charge. However the acquittal of the 2nd accused of similar charge was upheld. The 1st accused in his submission testified *inter alia*; that he intended to return to Iran and had passed on the tenancy of the apartment to one Rashid, who subsequently moved into the master bedroom of the apartment with 2 or 3 luggage bags and 2 or 3 boxes; that his brother had a set of keys for the apartment; that his son also had access to the apartment.

Held (dismissing the appeal):

(1) The burden of proof on the prosecution to prove every ingredient of the charge never shifts in the absence of any statutory provision. The law does not require the accused to establish the subject matter of the charge is medicinal opium. The chemist's testimony had created a serious doubt as to whether the substance he analysed is both in fact and in law,

raw opium and not medicinal opium. The prosecution had failed to establish a *prima facie* case against both the accused and therefore both the accused are entitled to an acquittal without their defence being called on both the chargers. (para 12)

(2) The apartment was not exclusively occupied by both the accused as there was clear access to others. The police failed to record any statement from those who had access to the apartment who were also crucial witnesses for the prosecution. (para 48)

(3) The prosecution's failure to investigate whether Rashid is a fictitious character introduced by the defence could not avail the prosecution. (para 49)

(4) The learned judge gave the benefit of the doubt to the 1st accused and found on the balance of probabilities that the box found in the apartment which contained substances forming the subject matter of the 2nd charge against the 1st accused was one of the boxes placed by Rashid when he came to occupy the apartment as testified by the 1st accused. (para 50)

(5) Both the accused were acquitted and discharged in respect of both the charges. The prosecution had failed to establish, beyond reasonable doubt, that the subject matter of the charge was, in law and in fact, raw opium, and that the accused were in possession of the said raw opium, at the material date, time and place. (para 51)

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39A(2), 39B(1)(a)

For both accused - Gurbachan Singh; M/s Bachan & Kartar
For the prosecution - Wan Shaharuddin Wan Ladin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

KN Segara J:

[1] The 1st and 2nd accused were charged with two offences under the Dangerous Drugs Act 1952, that is, firstly, for an offence under s. 39B(1)(a) for trafficking in 16,551 gm of raw opium and, secondly, for an offence under s. 39A(2) for possession of 543.5 gm of raw opium. Both offences were allegedly committed on the same date, time and place, that is 17 November 1999, 1.50am, Apartment No. S2B/7/5 South View One Ampang Avenue, Jalan Ampang Utara 2-1, Ampang Jaya. Both the accused were acquitted and discharged without their defence being called on 5 February 2003.

[2] The Public Prosecutor appealed against the order of acquittal by this court. The Court of Appeal allowed the appeal of the prosecution and directed that the defence of both the accused be called in respect of the charge of trafficking, and directed the defence only of the 1st accused to be called on the charge under s. 39A(2). The 2nd accused's acquittal on the charge under s. 39A(2) was upheld by the Court of Appeal.

[3] The defence of the accused was accordingly called and both accused elected to give evidence on oath. To corroborate certain aspects of their evidence, the defence also called upon 2 witnesses to testify on their behalf, as well.

[4] The learned defence counsel, in the course of his reply to the learned DPP's submission at the close of the case for the defence, said:

> No written judgement from Court of Appeal – DPP's submission on the reasons for the Court of Appeal allowing the appeal should be disregarded. I was at the Court of Appeal. The present DPP was not having conduct of the appeal. The Court of Appeal was presided over by Justice Dato Kader Sulaiman. All that was said by the Presiding Judge at the end of the appeal was that 'We are allowing the appeal of the Public Prosecutor on the 1st charge. We are of the view that an explanation is required. As regards the 2nd charge the acquittal of the 2nd accused is upheld but the appeal against the 1st accused is allowed.' That was all that was said and the case reverted to the High Court with no written grounds or even oral grounds delivered.

[5] I am in full agreement with learned defence counsel. I have to disregard the learned DPP's submissions on the reasons for the Court of Appeal allowing the appeal. I do not have the benefit of the Court of Appeal's grounds of decision before me. The grounds of decision of this court for not calling the defence is contained in the written grounds already delivered. I shall not repeat the said grounds in detail again in this judgment. All I wish to stress is, that at the close of the prosecution's case, this court was of the view, upon an evaluation of the evidence before the court, the prosecution had failed to prove possession, let alone *mens rea* possession, by the accused of the drugs forming the subject matter of the charge and, that they had exclusive occupation of the apartment (including the master bedroom of the apartment). In the circumstances, this court had ruled that the prosecution had failed to prove a *prima facie* case against the accused and, accordingly, both the accused were acquitted and discharged without their defence being called.

[6] Both the accused have now given an explanation in this court, as directed by the Court of Appeal. It is more than apparent, from their defence, that this court was fully justified in acquitting the accused without calling for their defence, in the first instance. I shall set out, shortly, what both the accused had to say in their defence. This court has no qualms in accepting their defence.

[7] Upon a re-evaluation of the prosecution's evidence against the accused and the material gaps in the prosecution's evidence, particularly, the failure to call Hassan Roshangah and Shaban Jahangirieird Musa (Rashid) to testify on behalf of the prosecution (or alternatively, to have taken a statement from both of them and made them available to the defence, in the event the prosecution elected not to call upon them to testify), coupled with the disparity in the weight of the drugs stated in the opening address by DPP (P5 – 17154.5 gm), the police report (P87 – 15360 gm) and that analysed by the chemist (17194.5 gm), the prosecution have failed miserably to prove their case beyond a reasonable doubt on the issue of the possession of the drugs and the identity of the drugs seized, at the close of the case for the defence. Therefore, in the circumstances of this case, it is totally futile and irrelevant to consider the issue of "trafficking".

[8] However, before I set out the explanation proffered by the accused, I think I shall first deal with a very crucial aspect of the ingredient of the charge, which was not proved by the prosecution at the close of the case for the prosecution, and which failure entitled the accused to an acquittal, *ipso facto*. Unfortunately, the court's attention was not drawn to the law on the said ingredient in the first instance, and the court had not taken same into consideration, when acquitting them without their defence being called.

[9] The drug which is the subject matter of the charge is "raw opium". Under s. 2 Dangerous Drugs Act 1952 "raw opium" means:

> **the coagulated juice** obtained from any plant from which morphine may be produced, **whatever its content of morphine** and in whatever form the coagulated juice is, **but** does **not** include **medicinal opium**;
>
> and
>
> "medicinal opium" means raw opium which has undergone the processes necessary to adapt it for medicinal use **in accordance with the requirements of the British Pharmacopoeia, whether in powder form or granulated or otherwise,** or mixed with neutral materials (emphasis added)

[10] An essential ingredient in both the charges to be proved by the prosecution is, that the drug trafficked, or in the possession of the accused, is "raw opium" and that the said raw opium is not medicinal opium. The burden is on the prosecution to adduce *prima facie* evidence that the substance analysed by the chemist is not medicinal opium. The chemist's testimony that the substance analysed is raw opium as defined under s. 2 Dangerous Drugs Act is insufficient to discharge the prosecution's burden of proof on the subject matter of the charge, without an affirmative assertion by the chemist (supported by his examination and analysis of the subject matter) that it is not medicinal opium.

[11] When is raw opium not medicinal opium? In fact, raw opium and medicinal opium can be identical. The chemist's testimony, "In raw opium the morphine content is found to be in the range of 10% - 15%. In this case the morphine content found in each of the dark brown substance examined was about 14% which is

consistent with the normal content of raw opium.", does not inspire confidence as to his knowledge and expertise on raw opium, in the light of the definition of raw opium under s. 2 Dangerous Drugs Act, which by the use of the expression, "whatever its content of morphine" in the coagulated juice obtained from any plant from which morphine may be produced, necessarily implies that the percentage of morphine content is not the criteria in determining whether a substance is raw opium or not. In fact, by its very definition, the substance to be raw opium must be coagulated juice from plant material from which morphine may be produced. The chemist never even testified that the "dark brown substance" examined was "coagulated juice". The chemist's testimony under cross-examination, "I agree by physically looking at a dark brown substance I could not establish that it is raw opium", has made the task on the prosecution of establishing knowledge of the substance in the possession of the accused, even more onerous. [N.B: The police witness described the substance to be "black" in colour whereas the chemist refers to the substance examined to be "dark brown".]

[12] It is not for the accused to raise the issue of medicinal opium with the chemist, in cross-examination, when the chemist has not uttered a word about medicinal opium in relation to the substance he analysed, under examination-in-chief. The burden of proof on the prosecution to prove every ingredient of the charge never shifts in the absence of any statutory provision. The law does not require the accused to establish the subject matter of the charge is medicinal opium. The chemist's testimony has created a serious doubt as to whether the substance he analysed is, both, in fact and in law, raw opium and not medicinal opium. On this ground itself, the prosecution has failed to establish a *prima facie* case against the accused and, therefore, both the accused are entitled to an acquittal without their defence being called on both the charges.

[13] Now, I shall proceed to consider the defence of the accused, which is essentially that they were not in possession of the subject matter of the charges.

[14] Both the 1st accused and the 2nd accused are citizens of Iran. Both accused gave evidence on oath. They speak and understand very well only the Parsi language and, quite obviously, have difficulty in understanding and communicating effectively in Bahasa Malaysia or English. A Parsi interpreter was made available throughout the trial.

[15] The evidence for the defence is briefly as follows:

[16] The 1st accused came to Malaysia to seek business opportunities and make investments. He came to Malaysia sometime in May 1999 and signed a tenancy agreement, for an apartment, with the owner of Apartment No. S2B/7/5 South View One, Ampang Avenue, Jalan Ampang Utara, Ampang Jaya, through a housing agent. The rental was RM1,800 per month. He paid RM1,800, being one month's rental in advance, and RM3,600, as deposit, to the agent and went into occupation of the apartment in May 1999. It was in this apartment that the 1st and 2nd accused were arrested on 17 November 1999, at about 1.50am. This apartment has a master bedroom with an attached bathroom, 2 other bedrooms, a store room, a kitchen and a common bathroom (see exh. P8).

[17] By notice dated 12 October 1999, he gave the housing agent notice to terminate his tenancy, with effect from 27 December 1999, as he wanted to return to Iran. He asked the agent to set off the one month's advance rental and deposit paid against the rental due from the date of his notice, but the agent only agreed to set off the sum RM3,600 he had paid as deposit.

[18] Amir is 1st accused's son. Hassan Roshanagh is his brother. The 2nd accused is his bother-in-law. He testified that his brother, Hassan, has been in Malaysia for 15 years. Hassan lived in Johor Bahru with his wife and son. Hassan has business dealings in Singapore and Malaysia. Hassan owned a car Honda Accord No WFJ 1053. Whenever Hassan comes down to Kuala Lumpur from Johor Bahru he stays at the apartment of the 1st accused. Hassan has a set of keys to the 1st accused's apartment. ("Semasa saya tinggal di tempat saya ditangkap, Hassan ada datang dan tinggal bersama-sama saya. Rumah Hassan adalah di Johor Bahru dan bila-bila dia datang ke Kuala Lumpur, dia tinggal di rumah saya tersebut. Hassan mempunyai kunci kepada rumah saya."). There are 3 rooms in the apartment – a master bedroom with an attached bathroom and 2 other rooms.

[19] The 1st accused testified, that in early November 1999 he used to frequent a disco, called "Imperial", in Jalan Sultan Ismail, Kuala Lumpur and there he had met a fellow country man from Iran, named Rashid. The 1st accused had also introduced his brother Hassan to Rashid, about a week after he had met Rashid at the disco. In the meantime, the 1st accused had already given notice of termination of his tenancy of his apartment, with effect from 27 December 1999, to his housing agent, and he informed Rashid of this, as Rashid was looking for accommodation for himself. Rashid requested 1st accused to pass on his tenancy to him if he could. The 1st accused agreed to allow Rashid to stay in the apartment and requested for RM3,600 from Rashid. This arrangement was made sometime on 4 or 5 November 1999.

[20] On 5 November 1999 Rashid came to occupy the apartment, pursuant to the arrangement made with the 1st accused. Rashid's friend helped bring his things, on 5 November 1999, to the apartment. Rashid brought 2 or 3 luggage bags and 2 or 3 boxes. Rashid occupied the master-bedroom. He kept the bags and the boxes in the store and his clothing in the cupboard in the master bedroom. Before Rashid came, the 1st accused used the said cupboard to keep his own clothing, but he had emptied it of his clothing before Rashid's arrival on 5 November 1999. He used the cupboard in the smaller room ("BILIK 3" in the sketch plan P8) he occupied after Rashid moved into the apartment on 5 November 1999. Rashid occupied the master bedroom. He testified, that the photograph P9L showing a cupboard with clothing, in the master bedroom, was in fact the clothing of Rashid.

[21] The 1st accused identified photograph P9J as showing the master-bedroom. He testified the trouser seen lying on the floor belongs to him and what is seen hanging on the door looks like clothing. He testified a shirt hanging on the door belongs to him – the shirt beside the black/red coloured shirt. He testified, other than the trouser on the floor and the shirt hanging on the door, none of the other clothing in the master bedroom on 16 November 1999, belonged to him. He identified that the trouser (P33) and the belt (P34) as belonging to him. He did not dispute the belt came with a small zipper compartment on the reverse side of it. He said on 16 November 1999 he had kept a herbal medicine in the zipper compartment of the belt to use to ease

breathing difficulty ("Pada 16 November 1999 saya ada simpan satu benda dalam ruang berzip P34. Saya telah simpan ubat herba dalam ruang tersebut bagi sesak nafas. Saya dapat ubat herba tersebut dari Iran.").

[22] On 14 November 1999, the 2nd accused came from Johor Bahru with Hassan to the 1st accused's apartment as he wanted to return to Iran on 16 November 1999. However, the 1st accused had suggested to the 2nd accused to cancel his plan to leave for Iran on 16 November 1999 and, instead, fly back to Iran together with him, on 20 November 1999. The 2nd accused accepted his suggestion, which was made to him on the night of 14 November 1999, soon after his arrival from Johor Bahru with Hassan.

[23] The 1st accused testified that on 16 November 1999, at 4pm, Rashid came to the apartment bringing along a bag. He took the bag into the room he was occupying, that is, the master bedroom. At about 8.30pm, Rashid left the apartment with the bag and, told the 1st accused that he would not be returning to the apartment that night because he was going to spend the night at his friend's apartment above, on the 8th floor. He informed 1st accused he would be going to the disco with his friend and would sleep overnight in his friend's apartment.

("Betul Rashid telah datang ke rumah saya pada 16 November 1999 jam 4 petang. Rashid membawa bersama-samanya satu beg. Malam 16 November 1999 jam lebihkurang 8.30 malam Rashid keluar dari rumah saya bersama-sama beg tersebut. Sewaktu dia datang pukul 4 petang 16 November 1999, dia telah membawa beg itu ke biliknya – iaitu bilik master bedroom. Apabila Rashid keluar bersama-sama beg tersebut jam 8.30 malam, dia memberitahu saya dia tidak akan balik ke rumah pada malam itu kerana dia akan bermalam di rumah kawannya iaitu diatas tingkat 8-5. Rashid juga ada memberitahu dia akan pergi ke Disko bersama-sama kawannya dan selepas itu akan tidur di rumah kawannya itu. Rashid memberitahu saya tentang perkara ini, OKT juga ada bersama-sama kami di ruang tamu kerana OKT2 dan saya sedia untuk keluar makan malam pada waktu Rashid ingin keluar.").

[24] Soon after Rashid left the apartment at about 8.30pm, on 16 November 1999, he went out for dinner with the 2nd accused and returned to the apartment at about 10.30pm. He testified that on the night of 16 November 1999 he slept in the master bedroom whilst the 2nd accused slept in the 3rd room of the apartment. He explained that he occupied the master bedroom on the night of 16 November 1999 because Rashid was not going to be there for that night and, he was accustomed to using the master bedroom, as it had an attached bathroom.

[25] The 1st accused testified that on 16 November 1999 he went to bed between 12 mid-night and 12.30am. He woke up at about 1.30am to ease himself. He switched on the master bedroom light but did not switch on the bathroom light as he found the bedroom light sufficient to light up the attached bathroom. He used the bathroom, and when he came out of the bathroom, he heard a noise at the grille door of the apartment. He suspected that there were robbers attempting to break in. He went and woke up the 2nd accused and asked him to come out of his room. Whilst he was talking to the 2nd accused, in the passageway leading to the rooms, he heard the doorbell ringing. He went towards the door of the apartment uttering, "Yes, Yes" and someone identified saying "Police". The 1st accused opened the door. He then told the 2nd accused in Parsi, not to worry, as there was no problem and, before he could finish talking to the 2nd accused, 2 persons attacked him and hand-cuffed him from behind.

[26] The 1st accused testified there were two Chinese police. One of them kicked the 2nd accused, who was then standing in front of the master bedroom. The 2nd accused cried when he was being kicked. He said, "No, No". The 2nd accused was then handcuffed. After they were handcuffed the police examined the apartment. He was forced to sit in the hall guarded by 2 persons whilst the police examined the apartment. At about 5am, he was taken to the master bedroom by the police. He saw the 2nd accused and 2 or 3 policemen inside the master bedroom. He testified that the police found a clutch bag (exh. P63). Inside the clutch bag, there were not only his personal documents, but also, the passport of Rashid. He testified that he did not know the actual name of Rashid until the passport was tendered in court by the police, and the name "Shaban Jirieirdrnusa" appeared on the said passport (exh. P52) found in his clutch bag.

[27] The 1st accused testified, that the photo of the holder of passport P52, found therein, is that of the person who had introduced himself as Rashid. He testified that the person in the photo in P52 is also known to others at the Imperial Disco as Rashid.

[28] The 1st accused testified that he obtained the passport, P52, from Rashid two day's before his arrest, that is, on 15 November 1999. He testified that he obtained the passport from Rashid because he wanted to assign his tenancy to Rashid. However, after receiving the passport he did not go and see the housing agent on 15 November 1999 because Rashid promised to give him the rent on 16 November 1999, calculated for the period 5 November 1999 - 27 December 1999.

[29] The 1st accused testified that, before the police came to his apartment on 17 November 1999, he did not at anytime keep any opium in his apartment. He testified that, he did not know whether there was any opium in his house, before the police came on 17 November 1999. He testified he did not permit anyone to bring opium into his apartment. He testified he did not know the smell of chandu and, that the "Herbal Iran" he takes (consumes) does not have any odour. ("Sebelum polis datang pada 17 November 1999, saya tidak pada bila-bila masa simpan candu di rumah saya. Saya tidak tahu bahawa samada apa-apa candu di dalam rumah saya sebelum polis datang pada 17 November 1999. Saya tidak membenarkan sesiapa membawa candu ke dalam rumah saya. Saya tidak tahu bau chandu. Herbal Iran yang saya makan tidak ada bau.")

[30] At about 5am, on 17 November 1999, the police took him, together with the 2nd accused, to the place where the bag (exh. P84) was found. When he was brought to the said place, the bag was already opened and its contents exposed. He testified he did not know how the bag came to be there.

[31] The 3 bags, which the police had seized and produced in court were marked as exhs. P57, P74 and P84. The said exhibits were shown to the 1st accused by his defence counsel when he was giving his evidence. The 1st accused testified that Rashid had brought 2 or 3 clothing bags and 2 or 3 boxes to the apartment,

A on 5 November 1999. The 1st accused testified that P84 was not the bag brought to the apartment on 5 November 1999 but, P74 was, indeed, one of the 3 bags brought to the apartment by Rashid, on 5 November 1999. He testified that P57 was his bag.

B **[32]** He testified that Rashid did not open bag P74 and show to him (its contents) when he brought it to the apartment on 5 November 1999. It did not have its original bag handle. It had an improvised string handle to replace the original handle. Although P74 shown to him in court had a string handle, he C testified it was not the similar white string handle that he saw on 5 November 1999.

[33] The 1st accused claimed that P57 which was his bag (an Echolac brief-case) contained his personal documents such as, D passport, driving license, Iranian I.C., International Driving, Licence, Cheque and Bank book. He testified that he took this bag with him wherever he went as it contained important documents and he was afraid they might get lost. He testified that on 16 November 1999 he had placed this bag in the room he E slept that night – that is, in the master bedroom. He testified, that he had not, at any time, kept any drug in P57.

[34] The 1st accused testified that he opened the door of the apartment on 17 November 1999 at about 1.30am to allow the police to enter his apartment. He testified he would not have F opened the door of the apartment when the police arrived if he had known there were drugs kept in his apartment. He testified that in the 3rd room, which was occupied by the 2nd accused, there was a clothing bag and presents to be taken to Iran. The 1st accused did not know whether the police had seized the bag G found in the 3rd room.

[35] The 1st accused testified that he had not thrown out bag P84 through the bathroom window. He testified that when the police came, on 17 November 1999, P84 was not in the H apartment. The 1st accused testified that P84 is the bag which Rashid brought to the apartment on 16 November 1999, at about 4pm, and that Rashid took it into the master bedroom. He further testified that P84, is the same bag which Rashid took along with him when he left the apartment at 8pm. The 1st accused testified I that after Rashid took the bag P84 and left the apartment at 8pm,

Rashid did not return to the apartment before the police arrived at about 1.30pm, on 17 November 1999. He testified that the bag seen in photographs P9S, T, U, V, W and X, is bag P84. A

[36] The 1st accused testified that before the police arrived at his apartment on 17 November 1999, at 1.30am, he did not keep any opium in his apartment. He testified he had no knowledge of the existence of any opium in his apartment, before the police arrived on 17 November 1999, at 1.30am. He testified he did not permit anyone to bring opium into his apartment and, before his arrest he had never seen opium, and did not know of its odour. He also testified that before 17 November 1999 he did not possess any of the opium found in the apartment by the police, or deal with the opium, together with the 2nd accused. He also testified he did not bring the drug "syabu" to the apartment. B C

[37] The 1st accused testified he had mentioned the name "Rashid" to the police when they were in the apartment at 1.30am on 17 November 1999 and, when the police took a statement from him on 19 November 1999. He testified, that when the 2nd accused came to his apartment from Johor Bahru on 14 November 1999, the 2nd accused had met Rashid in his apartment on 14, 15, and 16 November 1999. D E

[38] The 2nd accused testified he came to Malaysia about one month before he was arrested. He was arrested on 17 November 1999, at about 1.30am, together with the accused. The 1st accused is his brother-in-law. He is a citizen of Iran. He came to Malaysia as a tourist. F

[39] On his arrival in Kuala Lumpur from Teheran, he stayed a night at the apartment of the 1st accused, and then went to Johor Bahru with the 1st accused's brother, Hassan. He stayed in Hassan's house in Johor Bahru for a month. G

[40] He left Johor Bahru for Kuala Lumpur on 14 November 1999 with Hassan and arrived at 1st accused's apartment at about 1.30am, on 15 November 1999. When they arrived, the 1st accused, his son Amir and Rashid were in the apartment. The 1st accused, his son Amir, and his brother Hassan slept in the 2nd room whilst the 2nd accused slept in the 3rd room. The 2nd accused's testimony that the 1st accused occupied the 2nd room appears to contradict 1st accused's testimony, nevertheless, this H I

A contradiction is a minor contradiction of no serious consequence to the credibility of both the accused. On 15 November 1999, Rashid was occupying the master bedroom. The 2nd accused testified that when he left Johor Bahru on 14 November 1999 for Kuala Lumpur, he had intended to return to Teheran on 16
B November 1999. However, when he arrived in Kuala Lumpur on 15 November 1999 the 1st accused requested him not to return on 16 November 1999 but, to return together with him on 20 November 1999. He testified he agreed to 1st accused's suggestion.

C

[41] The 2nd accused testified that Hassan returned to Johor Bahru at 10am, on 15 November 1999, together with 1st accused's son Amir. The 1st accused gave Amir 2 bags to take back to Johor Baharu.

D

[42] The 2nd accused testified that when he woke up on 15 November 1999 he saw Rashid in the apartment. On the morning of 15 November 1999 at about 10am the 1st accused introduced Rashid to him. He saw Rashid still using the master bedroom on the morning and evening of 15 November 1999. He
E also testified that on the morning, afternoon and evening of 16 November 1999 Rashid was still using the master bedroom. The 2nd accused testified that from the morning of 15 November 1999 till he was arrested on the morning of 17 November 1999, he had never stepped foot into the master bedroom. He had not kept any
F of his clothing or personal effects in the master bedroom.

[43] The 2nd accused testified that on 16 November 1999, at about 4pm, he saw Rashid bring a bag to the 1st accused's apartment and take it into the master bedroom. At that time, the
G 1st accused and he were seated in the hall of the apartment. The 2nd accused further testified that Rashid came out of the master bedroom at about 8pm or 8.30pm with a bag similar to the one he had taken into the master bed room at 4pm. Rashid left the apartment with the bag. The 2nd accused testified he heard
H Rashid tell the 1st accused that he would not be returning to the apartment that night and, that he would be sleeping in his friend's apartment, one floor above 1st accused's apartment

I

[44] The 2nd accused testified that on 16 November 1999, at about 9pm, he went out with the 2nd accused to have their dinner. They returned to the apartment between 10pm and 11pm after their dinner. He testified that he slept in the 3rd room whilst the 1st accused slept in Rashid's room, that is, in the master bedroom.

[45] On 17 November 1999 he was woken from his sleep by the 1st accused, who said there were thieves trying to enter the apartment. He got out of his bedroom together with the 1st accused, and proceeded in the direction of the main door. He stopped in the hall and stood there. The 1st accused proceeded to the main door to ascertain who were at the door. The 1st accused opened the front door and then informed him in the Parsi language "Don't worry. Not thieves. Police officers." He testified that after that the persons who claimed they were police officers entered the apartment. They were not wearing police uniform. He testified that he was assaulted and a pistol was placed on the top of his head. He was told to sit down by the Chinese man. The 2nd accused testified that when he was assaulted he pleaded in English, "No! No!" meaning "don't assault" and cried. He was forced to sit at the place he was arrested and handcuffed with his hands behind his back. He testified that the 1st accused was forced to sit near the front door and, he too, was handcuffed with his hands behind his back.

[46] The 2nd accused testified that from the moment he was woken up from his sleep by the 1st accused and till he was forced to sit handcuffed, he did not enter the master bedroom or the bathroom. He testified that he did not, at anytime, throw out a bag through the window of the master bedroom bathroom.

[47] The 2nd accused testified the police brought him, together with the 1st accused, to the ground floor of the apartment block and showed an open bag. He further testified the bag, P84, which was shown to him in court, was the bag which was brought to the apartment by Rashid, on 16 November 1999. He testified he could identify Rashid's photo. He identified the photo, at p. 2 of the passport, P52, as that of Rashid. He testified he came to know only in court that the name of Rashid, according to the passport, P52, was "SHABAN JAHANGIRIEIRD MUSA". Under cross-examination by the learned DPP, the 2nd accused refuted that Rashid and the SHABAN, in passport, P52, are 2 different persons.

[48] The evidence of both the accused has clearly created a serious doubt in the prosecution's case, on the issue of possession of the subject matter of the charge, against both the accused. I am entirely satisfied the apartment was not in exclusive occupation of the accused. There was clear access to the master bedroom by Rashid. There was also access to the apartment by Hassan as he had a set of keys to the apartment. There was also access to the apartment by Amir. No statements were recorded by the police from Rashid, Hassan or Amir, although they were crucial witnesses for the prosecution.

[49] The explanation by the accused that the master bedroom had been occupied by Rashid from 5 November 1999 till 16 November 1999 is credible and believable. The explanation or assertion by both the accused that Rashid and "SHABAN" in the passport, P52, are one and the same person cannot be contradicted by the prosecution, because the police did not carry out any investigations on the passport, P52, which was a current passport, at the material time. As a consequence, any assertion by the prosecution that Rashid is a fictitious character introduced by the defence cannot avail the prosecution. I am entirely satisfied that the bag, P84, is the bag brought by Rashid into the apartment on the evening of 16 November 1999, and taken out again by him when he left the apartment at about 8pm, saying he was going to spend the night in the apartment of his friend above that of the 1st accused, on the 8th floor. I accept the evidence of the 2nd accused that he did not throw any bag out of the bathroom window of the master bedroom. The 2nd accused was merely a visitor to the apartment who had come from Johor Bahru to catch a flight to Teheran. He had no connection with the master bedroom. There is no evidence that the 1st accused told the 2nd accused to throw anything out of the bathroom window of the master bedroom. The purported circumstantial evidence adduced by the prosecution is suspect and doubtful.

[50] In respect of the box found in the store (P76), and inside which was found a blue plastic bag (P77), and from which was recovered a clear plastic package with a black substance (P78), forming the subject matter of the 2nd charge against the 1st accused, I have no hesitation in giving the benefit of the doubt to the 1st accused and making a finding, on a balance of probabilities, that the said box (P76) was one of the boxes placed

in the store by Rashid when he came to occupy the apartment on 5 November 1999, bringing with him 2 or 3 luggage bags and 2 or 3 boxes, as testified by the 1st accused.

[51] For the reasons already set out above, both the accused are acquitted and discharged in respect of both the charges. The prosecution has failed to establish, beyond reasonable doubt, that the subject matter of the charge is, in law and in fact, raw opium, and that the accused were in possession of the said raw opium, at the material date, time and place.